UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CLIFFORD PHILLIPS,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Civil No. 96-133-B***
	)	
SHIRLEY S. CHATER,	***)***	
Commissioner of Social Security,[1]	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS

Appearing *pro se*, the plaintiff filed this lawsuit to challenge the decision of the Commissioner of Social Security to deny him Supplemental Security Income ("SSI") benefits retroactively for a period from 1988 to 1995. The Commissioner has moved to dismiss the case on the ground that the court lacks jurisdiction in light of the plaintiff's failure to exhaust his administrative remedies. I recommend that the court grant the motion.

The record[2] reveals that the plaintiff filed initial applications for SSI benefits in 1979, 1980,

---

[1] In his complaint, the plaintiff names the Social Security Administration as the defendant. The Commissioner of Social Security is the appropriate defendant in a claim for social security benefits, *see* Loc. R. 26, and I have accordingly redesignated the title of the case.

[2] The "record" in this case consists of the Declaration of Jack K. Goldstein ("Goldstein Declaration") (Docket No. 5), an official of the Social Security Administration's Office of Hearings and Appeals, with certain attachments from the Social Security Administration's records. The First Circuit has suggested that the "better practice" in circumstances such as these is for the Commissioner to assemble and file the entire record. *Torres v. Secretary of Health & Human Servs*., 845 F.2d 1136, 1137 n.1 (1st Cir. 1988). The plaintiff has not availed himself of the opportunity to supplement or contradict the materials filed by the Commissioner, and I conclude that the limited record before me is sufficient to decide whether the court lacks jurisdiction on the ground asserted

(continued...)

1986, 1988 and 1995. Goldstein Declaration, ¶ 7. He also filed an application for Social Security Disability ("SSD") benefits on January 29, 1996. *Id.* The 1986 application is the first for which the Commissioner is able to locate any records, which reveal that this application was initially denied on June 10, 1986. *Id*., ¶¶ 8 and 8(a); Exh. 3. Similarly, the 1988 application was initially denied on February 7, 1989. *Id*. at 8(b) and Exh 5. Although the notice advised the plaintiff of his right to seek reconsideration of the initial determination, he did not do so. *Id*.

On July 21, 1995 the plaintiff contacted the Social Security Administration and requested a hearing on his 1988 claim. *Id*. at ¶ 8(d) and Exh. 7. Thereafter, an administrative law judge denied the request for a hearing on the ground that the plaintiff had never filed a request for reconsideration. *Id*. at ¶ 8(e) and Exh. 8. The plaintiff then requested that the Appeals Council review the administrative law judge's determination, but later withdrew this request through a legal representative. *Id*. at ¶¶ 8(e) and (h); Exhs. 9, 12 and 13.

In the meantime, the Social Security Administration had found the plaintiff disabled based on his 1995 application for SSI benefits. *Id*. at ¶ 8(f) and Exh. 10. However, the Social Security Administration advised the plaintiff by letter dated April 2, 1996 that his 1996 application for SSD benefits had been denied because the plaintiff lacked enough quarters of coverage to be insured for disability benefits. *Id*. at ¶ 8(f) and Exh. 14. Because the Commissioner determined that drug addiction and/or alcoholism is a factor material to the finding of disability, the plaintiff requested through attorney Richard F. Bach that Bach be named representative payee as to the SSI benefits. *Id*. at ¶ 8(g) and Exh. 11.

---

[2](...continued)
by the Commissioner. *Id*.

The plaintiff filed his complaint in this court on May 21, 1996. In it, the plaintiff contends that he is entitled to benefits retroactive to the 1988 application, that the Commissioner improperly refused to permit him to designate a family member as his representative payee, that the Social Security Administration has improperly refused to assist him in reviewing his medical records[3], and that he "felt as though" the person handling his case in the agency's Bangor office began treating him differently, and presumably less favorably, upon learning he was an American Indian. Complaint ¶ 16. Liberally construed, this *pro se* complaint purports to state claims under both the Social Security Act and the law enjoining discrimination based on race.

The Commissioner contends that dismissal of the complaint is required because section 205(g) of the Social Security Act, 42 U.S.C. § 405(g), is the only basis for a claimant to seek judicial review of a denial of SSI benefits, and that such review is precluded because there has been no "final decision" of the Commissioner as required by the statute, at least as to the matters raised in the complaint. Therefore, the commissioner contends, the court is without jurisdiction to entertain the case. I agree.

As a preliminary matter, I note that the Commissioner's motion does not invoke a specific provision of the Federal Rules of Civil Procedure in requesting dismissal of the complaint. Rules 12(b)(1) (dismissal for lack of subject matter jurisdiction) or 12(b)(6) (dismissal for failure to state a claim upon which relief can be granted) are possible bases for the Commissioner's motion. When a movant seeking dismissal pursuant to Rule 12(b)(6) submits matters outside the pleadings, "the motion shall be treated as one for summary judgment . . . and all parties shall be given reasonable

[3] It is not clear from the complaint whether the plaintiff contends these records are in the possession of the Social Security Administration.

opportunity to present all material made pertinent to such a motion by Rule 56." Fed. R. Civ. P. 12(b). In this instance, the plaintiff has not responded at all to the Commissioner's motion, other than to request an extension of time for the filing of his statement of errors pursuant to Local Rule 26. It is therefore appropriate to treat the Commissioner's motion as one for summary judgment, and to assume that there is nothing further in the agency record that would be relevant to the issues raised by the Commissioner's motion. *Torres*, 845 F.2d at 1137 n.1 (noting that summary judgment procedure in Social Security cases "not an invitation" to contradict or supplement administrative record).

Torres also provides the rationale that governs the merits of the Commissioner's motion. "Absent a colorable constitutional claim . . . a district court does not have jurisdiction to review the [Commissioner's] discretionary decision not to reopen an earlier adjudication." *Id*. at 1138 (citations omitted). In other words, the Social Security Act authorizes judicial review only of final decisions of the Commissioner made after a hearing, which means the Commissioner's "initial substantive decision on a claim for benefits." *Dudley v. Secretary of Health & Human Servs*., 816 F.2d 792, 795 (1st Cir. 1987). Therefore, the statute "cannot be read to authorize judicial review of alleged abuses of agency discretion in refusing to reopen claims for social security benefits." *Id*. (quoting *Califano v. Sanders*, 430 U.S. 99, 107-08 (1977)) (other citation omitted).

Although the plaintiff refers to racial discrimination in his complaint, he does not invoke the Constitution and, indeed, refers explicitly only to the Maine Human Rights Act in asserting this aspect of his case. Therefore, as in *Torres* and *Dudley*, the plaintiff raises no colorable constitutional claim that justifies an exception to the strict jurisdictional bar set forth in those cases.

Accordingly, I recommend that the Commissioner's motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 5th day of September, 1996.

_____

David M. Cohen
United States Magistrate Judge